United States Court of Appeals

for the Second Circuit

REPLY BRIEF

74-2140

Docket No. T-3785
74-2140

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROBERT BEGINS and
PATRICIA BEGINS
Appellants

v.

PAUL PHILBROOK
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

OF THE DISTRICT OF VERMONT

Docket No. 74-43

REPLY BRIEF

ZANDER B. RUBIN, ESQ.
Vermont Legal Aid, Inc.
56 Railroad Street
St. Johnsbury, Vermont 05819

3

TABLE OF CASES

Appellants agree with appellee's position that besides for the issue of mootness, all aspects of the 'case or controversy' requirements, must be met in a declaratory judgment action, as any other action. Aetna Life Insurance Company v. Haworth, 300 U.S. 227 (1936). Appellants made this clear in their Brief. See, Appellants Brief at 8-9. Thus, appellants also agree that aside from the mootness doctrine, other jurisdictional requirements must be met. Appellee phrased the issue as whether appellants were seeking an advisory opinion; appellants phrased the issue as to whether declaratory relief was appropriate. Although the words are different, the standards to be applied are the same, and, once again, appellants agree with the standards set forth in appellees brief as they were the same standards that were set forth in appellants brief. The only difference is that appellants feel that the appropriate standards have been met by the facts of this case.

The basic standards are that:

> "A controversy ... must be one that is appropriate for judicial determination ... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot ... The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests ... It must be

> a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts ... Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages ..." Aetna Life Insurance Company v. Haworth, supra, at 240.

Elaborating on this, the Supreme Court stated:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree ... Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality, to warrant the issuance of a declaratory judgment. Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 US 270, 273 (1941). (emphasis added)

Appellee's presentation of the issue thus coincides with appellants, and the case must be determined upon a finding by this Court as to whether the facts alleged are of "... sufficient immediacy and reality" to warrant the issuance of a declaratory judgment. Thus, it is really a question of drawing a line at what state of facts are sufficiently real and

immediate, and determining which side of the line the facts of the case fall upon. Put another way, this Court must determine how many steps the present case is removed from actuality, and then decide if that is too far removed to present an actual controversy.

Appellants discussion of this was found at pages 23-30 of their brief, and the case of American Machine and Metals, Inc. v. DeBothezat Impeller Company, 166 F2d 535 (2 Cir. 1948) was cited as containing an excellent discussion of the precise question involved in this case. Appellants still feel that this case is most on point in showing the type of analysis that must be undertaken here, i.e. how many steps is the controversy removed from actuality.

In Appellants Brief they submitted that the present case was only one step removed from actuality and thus was justiciable. That one step was the actual purchase of a second car, while the appellants had only alleged that they wanted a second car and would buy the car if a declaratory judgment was rendered in their favor. A-8.

Appellees seek to avoid this conclusion by trying to show that the controversy is far removed from reality and totally speculative. It is here that the basic difference lies. Appellees say since appellants no longer own two cars, it is "wholly conjectual" whether that situation will arise,

(Appellee's Brief at 6) and that "it is pure speculation" to presume that it will. (Appellee's Brief at 8). However, as stated in Appellants Brief, this case was decided on a motion to dismiss, and thus the material allegations of the complaint are taken as true. Jenkins v. McKeithen, 395 US 421, rehearing den 396 US 869 (1966); Cooper v. Pate, 378 US 546 (1963). Since appellants had alleged that they need and want two cars but wanted declaratory relief before taking further action, A-8, it is submitted that this is an allegation that they would purchase a second car. Perhaps the complaint could have been more precise, but the intent is clear, and the complaint should not be dismissed on a technical deficiency of pleading, if there is one. As the Supreme Court stated in Jenkins v. McKeithen, 395 US 411 reh den 396 US 869 (1966):

> "For purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted. And, the complaint is to be liberally construed in favor of plaintiff." Id at 421.

See also, Jung v. K & D Min. Co., 260 F2d 607 (7 Cir. 1951); Parkinson v. California Co., 233 F2d 432 (10 Cir. 1956); King Edward Credit Union v. Travelers Indem. Co., 206 F2d 726 (5 Cir. 1958); Knox v. First Sec. Bank of Utah, 196 F2d 112 (10 Cir. 1952); Abelo v. Munro, 110 F2d 647 (2 Cir. 1940); Build of Buffalo, Inc. v. Sedita, 441 F.d 284 (2 Cir. 1971); Fowler v. Southern Bell Tel. Co., 343 F2d 150 (5 Cir. 1965).

If there is a question of whether the appellants would actually buy a second car if a declaratory judgment were rendered, this type of question should be handled by taking the testimony of the appellants at a trial on the merits, and cannot be handled by a Motion to Dismiss.

Thus, the Appellee is wrong in asserting there is anything at all speculative about whether appellants will purchase a second car. They have alleged that they will, and that allegation is binding at this stage of the proceeding. For this case it is submitted that the case of Lecci v. Cahn, 493 F2d 826 (2 Cir. 1974), relied upon by the appellee, rather is supportive of appellants position. In Lecci, the plaintiff was no longer a policemen subject to the statute, and thus this Court held the action to be moot. Appellee says that "... the Begins are no longer subject to the 'two car' regulation since they have sold their second car." Appellee's Brief at 7. However, this is simply erroneous reasoning. The Begins are still receiving ANFC and thus still subject to the "two car" regulation, and there is not and cannot be any dispute about this. If the Begins were to cease receiving ANFC benefits, then they no longer would be subject to the "two car" regulation, and the analogy to the Lecci case would hold, but that is not the case.

Additionally, in Lecci the Court stated, as appellee noted:

> "Although the plaintiff was a policeman, there is no indication in his complaint that he was proposing to undertake any political activity which might be within the statute." Id at 820.

Appellee notes that the Begins also have not alleged that they are proposing to violate the welfare regulation. Appellee's Brief at 12. Once again, it is submitted that this is simply wrong. In appellant's Amended Complaint they alleged that they wanted and needed a second car, but sought declaratory relief before doing that. A-8. This clearly appears to indicate that they wanted to undertake action prohibited by the regulation, and Lecci would appear to say that this is enough, and that the action would not have to be taken in order to present a justiciable controversy. The Lecci opinion quotes from the complaint and clearly shows that there was not the slightest indication in the complaint that the plaintiff was seeking to take any action that was prohibited by the statute (emphasis added). Id at 828, p. 3. By comparing the allegations in that complaint to the allegations in the Begins Amended Complaint, it is clear that there is a world of difference, and that the Begins' clearly indicated what they specifically wanted to do. Once again, it is submitted that the intent of the Amended Complaint was clear, especially in light of the prior history of the parties, and that it should not have been dismissed on the pleadings if any uncertainty existed, as to what exactly was proposed. See,

Jenkins v. McKeithen, supra, and cases cited on p. 4 of this Brief. Thus, Lecci would appear to support appellant's claims here, or, at the least, is clearly distinguishable.

Appellee also relied on this Court's opinion in Sanders v. Wyman, 464 F2d 488 (2 Cir. 1972). There, the Court found, and it was not disputed, that the plaintiffs no longer lived in a "welfare hotel", so that there no longer was any possibility of the threatened action to occur to them. Id at 491. Once again, if the Begins were no longer receiving ANFC, and thus not subject to the "two car" regulation, the analogy would follow. However, as previously stated, the Begins still are receiving ANFC and thus still are subject to the regulation, and thus still are in a position to press their claim. For that reason the Sanders case appears completely off-point here.

Similarly, Kerrigan v. Boucher, 450 F2d 487 (2 Cir. 1971) is also clearly distinguishable. There, in an action challenging Connecticut's housekeepers' lien statute, the tenant had received his goods back, and had removed himself from the premises, and thus this Court found that the "... prospect that either of the parties here would resume their prior relationship seems particularly remote." Id at 489. Here, once again, the Begins have not left the welfare roles, and thus the parties are still in their existing relationship.

Appellee also relies on two U. S. Supreme Court decisions, which, it is submitted, are also easily distinguished. In International Longshoremen's Union v. Boyd, 347 US 222 (1953) a labor union sought declaratory relief to enjoin the Director of Immigration and Naturalization from construing a section of the Immigration and Naturalization Act so as to treat aliens domiciled in the United States returning from temporary work in Alaska as if they were aliens entering for the first time. Id at 222-223. In holding there was no justiciable controversy the Court noted that the statute had not yet been so interpreted and applied, and that the lawsuit was an endeavor

> "... to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable." Id at 224.

Here, there is no question on the interpretation of the "two car" regulation, and there is a definite concrete fact situation in which it would be applied. There is no doubt that if appellants purchased a second car, the regulation would disqualify them from ANFC.

In Communist Party v. Subservice Activities Control Board, 367 US 1 (1960), the Communist Party sought a declaration that various sections of the Act were unconstitutional, even though only one section had been imposed. The Court refused to rule on the other challenged sections stating that it was premature, as it could not know what actions, if any, that might

be taken by the Party in the future would violate the Act, and that there were many intervening variables that might lead to the result that the Act would not be applied as anticipated. Id at 78-81. The Court stated:

> "It is thus impossible to say now what effect the provisions of the Act affecting members of a registered organization will have on the Party. To pass upon the validity of those provisions would be to make abstract assertions of possible future injury, indefinite in nature, and degree, the occasion for constitutional decision. Id at 81.

In our case, the action to be taken in simple and definite, i.e. the purchase of a second car, and the result of that purchase is also definite, i.e. the "two car" regulation prescribes denial of ANFC. Thus, none of the factors contributing to the Communist Party decision are present here.

Appellee also relies heavily on the cases of National Student Association v. Hershey, 412 F2d 1103 (D.C. Cir. 1969) and United Public Workers v. Mitchell, 330 US 75 (1947) and thus these cases must be analyzed. In Hershey, where a student group challenged certain draft regulations although they had not broken them, appellant feels the Court provided an excellent analysis of the principles to be applied in cases like this, much like the discussion of this Court in the American Machine case, and that applying the principles to this case leads inevitably to the conclusion that this case is presently justiciable.

The Hershey court noted that the crux of the problem was whether a dispute in a declaratory judgment action has 'sufficient immediacy and reality' to make it justiciable. Id at 1110. It further noted that there were two general principles relevant in making that determination and that:

> "The first is that a plaintiff need not invariably wait until he has been successfully prosecuted, dismissed, denied, a license, or otherwise directly subjected to the force of a law or policy before he may challenge it in court. The second is that mere existence of a statute, regulation, or articulated policy is ordinarily not enough to sustain a judicial challenge, even by one who reasonably believes that the law applies to him and will be enforced against him according to its terms."
> Id at 1110.

Quoting from U.S. v. Mitchell, supra, the Hershey court stated that the justiciability question is spread along a

> "... continuum ranging between 'a general threat by officials to enforce those laws which they are charged to administer' and a 'direct threat of punishment against a named [party]... for a completed act.' Suits predicated, on threats nearer the 'general' rule are not justiciable, suits nearer the direct pole are."
> Id at 1111.

In Hershey, although the Court stated the facts appeared closer to the general threat, it noted an exception because of the possible 'chilling' effect on First Amendment rights and held it to be justiciable.

Here, there is no First Amendment claim involved, but the above analysis is useful. The 'continuum' approach is basically the same approach this Court applied in the American Machine Case, i.e. how many steps removed from actuality is the dispute. Under the Hershey and Mitchell analysis, it is submitted that here there is no general threat to enforce regulations, but a direct threat against appellants for their taking a specific action. It is true that the action hasn't been completed, but that it is the only step not taken, and there are not any other variables involved, as there were in Mitchell.

In Mitchell, certain federal employees sought to declare a provision of the Hatch Act unconstitutional. In their complaint they alleged that they desired to engage in certain political activities, which they alleged were prohibited by the Act. In holding this claim not to be justiciable the Court noted that:

> "The power of courts ... to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirement of public under except when definite rights appear upon the one side and definite prejudicial interference upon the other. (emphasis added) Id at 89-90.

The Court went on to add:

> "Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories. (emphasis added) Id at 90-91.

Thus, it seems very clear that what the majority in the Mitchell case was concerned about, and it must be noted that the Opinion of the Court on this point was joined by only 4 Justices, was that the complaint was too vague and general in its allegations as to what type of conduct might be engaged in that might violate the Act. The Court noted that it could only speculate as to the kinds of political activity in which the plaintiffs wished to engage, Id at 90, and thus the issuance of a declaratory judgment was not appropriate, as the plaintiffs were attempting to enjoin the general application of a statute without showing how it specifically was to be applied to them for definite action that had been taken or would take. Id at 88-89. The Court found:

> "Such generally of objection is really an attack on the political expediency of the Hatch Act, not the presentation of legal issues." Id at 89.

The opinion is replete with references to general or indefinite rights asserted; and it is submitted that the decision is easily distinguishable on that ground and its peculiar facts. In our case, there is absolutely no need to speculate

as to what kind of action appellants desire to engage in, i.e. they want to purchase a second car. A-8. Thus, the basic problem presented in Mitchell is absent, and the case is no bar, to a finding of justiciability here. Obviously, it would be inappropriate to enjoin an act when a Court can only speculate as to what actions the plaintiffs might take to violate it, but where there is a simple and definite allegation as to the conduct which the plaintiffs desire to engage upon, the issuance of a declaratory judgment is appropriate when the reality and immediacy as shown in this case is present.

Appellee recognizes that the Mitchell case was decided on the ground that it was impossible for the Court to determine what action the individuals would take, Appellee's Brief at 10, but seeks to put this case in the same light by stating:

> "Here, the Court has no way of knowing what if anything, the Begins would do if the welfare regulation were declared unconstitutional. Would they actually buy another car? Would the vehicle be of a type that does not fall within an exception to the regulation? Would they still be receiving ANFC benefits at the time they bought the car? Would the regulation be applied as they anticipate? Appellee's Brief at 10.

These points, it is submitted, are entirely erroneous, and, some are entirely specious. It is true that the Court would not know with a 100% guarantee that the Begins would purchase a second car if they won this case, but that is true in

any declaratory judgment action, and, if that reasoning were to be applied, would render meaningless the declaratory judgment proceeding. As pointed out in Appellants Brief, the purpose of the Declaratory Judgment Act was to allow persons to get a declaration of rights before they took any action, Appellant's Brief at 24-29, and in any of these cases the Court would not know for certainty what would happen if a declaration of rights was granted.

The cases, like American Machine, make clear that one must examine the number of steps that the action is removed from actuality, and here there is only the step of the actual purchase of the car, with no other intervening variable. The prior history of the Begins, i.e. they had always had two cars and, in fact, had ANFC denied once before because of ownership of two cars, lends credence to their allegation that they want a second car now, but want declaratory relief before buying it.

Appellee next asks if the vehicle would be of a type that might fall within an exception to the regulation. This point is entirely specious as appellee stated in his Memorandum In Support of Defendant's Motion to Dismiss:

> "There are exceptions to this disqualification which are not relevant here."
> At 1.

Appellee also conceded at the hearing held on the Motion to Dismiss that the exceptions to the "two car" regulation, which

basically exempt additional vehicles which qualify as income producing property, do not apply here. Appellants have never attempted to claim that they fall within any of the exemptions, and cannot and do not make that claim now.

Appellee next asks if appellants would still be receiving ANFC benefits at the time they bought the car. Once again, this is entirely specious. Obviously, if appellants were not receiving ANFC benefits serious mootness problems would then present themselves, and would make applicable the cases cited by appellee. But appellants are now receiving ANFC and appellee is engaging in "pure speculation" that they would not when they bought the car. The question is not what will happen in the future, but what is the situation now. If appellants sought to challenge the regulation on the basis that they might be receiving ANFC in the future, that would be speculative and nonjusticiable, and the reverse is also true.

Finally, appellee asks if the regulation would be applied as they anticipate. Not only is this specious, but it borders on the outrageous. The regulation is in the manual; it has been applied to these very people in the past; and appellee has given <u>absolutely no indication that it would not be applied.</u> There is no ambiguity involved, and appellants are at a loss as to determine what could have prompted appellee to raise this point. There are cases where declaratory relief was denied

where a statute was not enforced, see Poe v. Ullman, 367 US 497 (1960), or where there is doubt as to the interpretation of a statute, see Alabama State Federation of Labor v. McAdary, 325 US 450 (1944); or where there are many intervening factors that might mean the particular provisions of the statute may never be reached. See, Communist Party v. Subversive Activities Control Board, 367 US 1 (1960). However, where, as here, the appellee has not shown any reason why the regulation would not be applied to appellants, none of these principles are applicable.

As to appellees point concerning the difference between cases involving private parties as opposed to government agencies, see Appellee's Brief at 15-17, it is submitted that the cases cited there do no more than repeat the well-recognized maxim that constitutional questions are to be avoided where possible, and that they do not adopt a different standard for mootness in cases involving public questions, but merely remind the courts to exercise caution in those cases. Since appellant's feel they satisfy all existing standards of mootness, they also would urge this Court to review the facts closely and exercise a maximum of caution in coming to a decision.

Thus, it is submitted, that for the reasons outlined in Appellants Brief, this case has the necessary "immediacy and reality" to warrant the issuance of a declaratory judgment,

and that the attempts by appellee to cloud the issue and inject speculativeness where there is none highlights the weakness in appellee's position. Thus appellants respectfully request that the decision of the District Court be reversed and the case remanded for a decision on the merits.

Dated: 4/15/75

Respectfully submitted,

ROBERT BEGINS
PATRICIA BEGINS

By: Zander B. Rubin

Zander B. Rubin, Esq.
Vermont Legal Aid, Inc.
56 Railroad Street
St. Johnsbury, Vermont 05819
Their Attorneys